

Proposed Aquatic Pesticides Strategy

What Is the Issue?

On March 12, 2001 the US Court of Appeals for the Ninth Circuit issued an opinion in the *Headwaters, Inc v Talent Irrigation District* case ("Talent"). The case involved a complaint filed against Talent for the use of aquatic pesticides (primarily acrolein) in irrigation district canals under FIFRA label but without a Clean Water Act NPDES permit. The use of such pesticides can and occasionally does cause downstream fish kills and other adverse effects. The court found that the canals are waters of the US subject to the CWA, and that the aquatic pesticide used is a "pollutant" under the CWA. Therefore it can only be applied to such waters with the authorization of an NPDES permit.

Talent requested reconsideration of the court's ruling, which the court denied, and has now appealed to the US Supreme Court. In the interim the decision is not stayed and is applicable to all states within the 9th District. The appeal could take considerable time to come to a final conclusion.

Current Practice

Ecology has historically used short-term modifications of the water quality standards ("mods") as a vehicle to approve the use of aquatic pesticides, as well as other activities in the water. We have issued these mods as administrative orders. They are not CWA permits, but rather a creation under state law and the state's water quality standards. We have established application, notice and environmental review requirements. We have prepared an EIS and several supplements to examine the toxicity, risks and alternatives of using chemicals and other control methods.

Generally, applications are submitted to Ecology in the winter and the "mods" are issued in the spring. Each year Ecology issues about 50-100 water quality mods for control of such pests as gypsy moth, *Spartina*, purple loosestrife, milfoil, burrowing shrimp, mosquitoes, undesirable fish, and other nuisance plants.

One notable exception is irrigation districts, which have historically asserted a right to use pesticides in irrigation facilities without approvals from Ecology. There have been occasional fish kills resulting from their activities when the treated waters enter downstream rivers and lakes. They use herbicides throughout the spring and summer to control plants and algae in canals and laterals to keep the plants from choking off the flow of water in order and interrupting water delivery to farmers. The irrigation districts are concerned about the impact of the decision on their use of aquatic pesticides.

We contacted EPA to learn what plans, if any, they may have on this issue. EPA appears to be using only “enforcement discretion”. Oregon and California appear to be headed towards administrative orders to authorize pesticide use this year with NPDES permits issued in the future.

Some key points

- The Headwaters v. Talent decision clearly states that irrigation district facility waters that are tributary to natural water systems are waters of the US and are subject to the Clean Water Act. This is in line with the recent federal court decision(s) in the Yakima dairy waste cases.
- The decision states that acrolein (the pesticide at issue in the case) is a “pollutant” and that a CWA discharge permit is needed to apply it to such waters. By extrapolation, NPDES permits may be needed for similar applications of aquatic pesticides to waters of the US.
- There isn’t time to issue NPDES permits for this season.
- Recent state legislation to streamline "permits" for aquatic pesticides may be in conflict with this ruling on the CWA. We need to examine 90.48 RCW more closely, and if conflicts are found we will likely need follow-up discussions with key legislators and their staff.
- Potential impacts to ESA listed species may be an issue. Currently, our short term mods are not submitted to the Services for ESA review. However, a recent white paper (“A Process for Evaluating Pesticides in WA State Surface Waters for Potential Impacts to Salmonids”) by several state and federal agencies proposed that pesticides “permitted” through our short term mods would not require further protections for salmonids.

Proposed Approach:

Develop an application form that can suffice for both short-term mods and NPDES permits. Upon submittal of an application for use of aquatic pesticides, continue our normal process to issue short-term mods of the water quality standards this year. Inform applicants of the Talent case and warn them of possible liability and likely future changes to the aquatic pesticides program. Condition the transmittal letters and mods to note that they are not discharge permits under the CWA and that other permits may be required. Accept NPDES applications, but note that it is likely that permits will not be issued this year since we have not yet developed appropriate NPDES permits. Begin taking steps to issue NPDES permits next year, most likely a series of general permits. An appropriate permit fee structure will need to be established by rule as required by state law.